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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ATREUS CHANDLER, Plaintiff and Respondent, v. CALIFORNIA STATE PERSONNEL BOARD et al., Defendants and Appellants.	E071304 (Super.Ct.No. CIVDS1508314) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Reversed with directions.

Alvin Gittisriboongul, Chief Counsel and Dorothy Bacskai Egel, Senior Attorney, for Defendant and Appellant, California State Personnel Board.

Xavier Becerra, Attorney General, Chris A. Knudsen, Assistant Attorney General, Gary S. Balekjian and Jacqueline H. Chern, Deputy Attorneys General, for Defendant and Appellant, California Department of Corrections and Rehabilitation.

Benedon & Serlin, Douglas G. Benedon, and Kelly R. Horowitz, for Plaintiff and Respondent.

This appeal arises from appellant California Department of Corrections and Rehabilitation's (CDCR) dismissal of respondent Atreus Chandler from his position as a parole officer for failing to report another officer's mistreatment of a parolee and for being dishonest during CDCR's investigation into the incident. After the State Personnel Board (SPB) issued an opinion upholding the dismissal, Chandler filed a petition for writ of mandate with the trial court challenging the SPB's decision on several grounds, including that CDCR violated the one-year statute of limitations set forth in the Public Safety Officers Procedural Bill of Rights Act. (Govt. Code, § 3304, subd. (d); unlabeled statutory citations refer to this code.) Chandler argued that CDCR discovered his alleged misconduct by July 28, 2010, but he was not given notice of his proposed discipline until over a year later, on August 9, 2011. CDCR argued that Chandler forfeited this argument because he never raised a statute of limitations defense below, during the administrative proceeding. The trial court granted Chandler's writ on the ground that CDCR violated the statute of limitations, but denied the writ on every other basis.

CDCR and SPB appeal that ruling on two grounds. They argue the trial court erred as a threshold matter by considering Chandler's statute of limitations argument even though he forfeited it. They also argue the trial court erred by concluding CDCR violated the statute of limitations without sufficient evidentiary support. We agree on both points. As we explain, Chandler both forfeited the defense by failing to raise it in the administrative proceeding and failed to carry his burden of proof to demonstrate CDCR

in fact exceeded the statute of limitations. The trial court accepted Chandler's assertions as to when CDCR discovered the misconduct and notified him of the proposed discipline, without any evidence to support those representations. We will therefore reverse the order granting Chandler's petition on the statute of limitations ground and direct the trial court to deny his petition in its entirety.

I

FACTS

A. *The Incident*

Chandler began working as a Parole Agent I for CDCR in February 2007. Under CDCR's employment policies, all employees are required to report any misconduct they observe other employees engaging in and to be honest during and cooperate with official investigations.

We briefly recount the incident underlying Chandler's dismissal as it is not relevant to the issues on appeal. On July 26, 2010, Chandler and fellow parole agent Edwin Martinez went to the sober living facility where parolee Richard Reyes was living to arrest him for violating the term of his parole that he not consume illegal substances. Chandler and Martinez found Reyes inside his duplex at the facility, handcuffed him, and Martinez took him to his bedroom to search for drug paraphernalia. While Martinez was searching Reyes's bedroom, Chandler stood in the hallway outside the bedroom, monitoring the other parolees who were in the duplex's living room. Chandler was

standing close enough that Reyes could see him and hear him giving orders to the other parolees.

As Martinez searched Reyes's room, he began to verbally accost and berate Reyes for lying to him about doing drugs. He told Reyes to stay out of San Bernardino and find a home elsewhere. He threatened that if he or other parole agents found him in San Bernardino they would "jack [him] up." He said they would "watch [Reyes] like a hawk" and "shake [him] down." One of the facility's owners heard Martinez yelling from outside Reyes's duplex and came over to see what was going on. When the owner entered the duplex, Chandler told him to sit down in the living room. The owner observed Martinez's rant for about ten minutes, recording 53 seconds of it on his cell phone from his vantage point in the living room.

Chandler and Martinez took Reyes to the West Valley Detention Center for processing, where jail staff placed Reyes in a choke hold, causing him to temporarily lose consciousness. Before Chandler left, Reyes told him the deputies had assaulted him. Chandler relayed to his supervisor that Reyes claimed the deputies beat him up, but he did not mention Martinez's tirade against Reyes during the arrest.

B. *CDCR's Investigation and Discipline*

On March 29, 2011, CDCR notified Chandler that they would be interviewing him as part of the investigation into the July 26, 2010 incident with Reyes. During the interviews, Chandler repeatedly told the investigator that he did not hear Martinez's

demeaning comments to Reyes. At the outset of the investigation, the investigator advised Chandler that he could be subject to discipline if he did not tell the truth.

On July 20, 2011, CDCR served Chandler with a notice of dismissal by certified mail to his address of record. The notice informed Chandler that he was being dismissed from his position, effective August 19, 2011, for misconduct including dishonesty, inexcusable neglect of duty, and willful disobedience. The specific misconduct identified in the notice was Chandler's alleged intentional failure to report Martinez's treatment of Reyes on July 26, 2010 and his subsequent alleged dishonesty during the investigation.

On August 9 and again August 11, 2011, CDCR served Chandler with an amended notice of dismissal.[1] The second amended notice is substantively identical to the original notice, but changes the effective date of Chandler's dismissal from August 19 to August 26, 2011. On August 26, 2011, CDCR dismissed Chandler.

C. *The First Administrative Hearing*

Chandler appealed his dismissal to the SPB, which held an administrative hearing on April 18, 19, and June 14, 2012. In August 2012, the SPB issued an opinion affirming the dismissal, which Chandler challenged by way of a petition for writ of mandate with the trial court. In April 2014, the trial court set aside the SPB's 2012 decision and ordered

[1] CDCR's notices are not part of the administrative record nor were they before the trial court when it ruled on Chandler's writ petition. However, both CDCR and Chandler represented to the administrative law judge in their prehearing/settlement conference statements that CDCR served Chandler with the first notice by mail on July 20, 2011.

it to reconsider the matter in light of additional evidence. The SPB vacated its 2012 decision and held a new hearing. This appeal concerns that second hearing.

D. *The Second Administrative Hearing*

On remand, the SPB set the matter for a prehearing and settlement conference and ordered the parties to file statements in advance, directing them to its governing regulations. The SPB's regulations require each party to an evidentiary hearing to file a written prehearing/settlement conference statement containing specific information, including any "affirmative defenses" to any claim. (Cal. Code Regs., tit. 2, § 57.1, subd. (f)(3).) Failure to timely file or fully disclose all required items in the prehearing/settlement conference statement without "good cause" permits the administrative law judge, in their discretion, to exclude evidence at the hearing. (*Id.* at subd. (g).)

Chandler, who was represented by counsel, filed a prehearing/settlement conference statement that did not assert or identify any affirmative defenses. In the section of his statement entitled "Affirmative Defenses," he stated that although "not classically delineated as affirmative defenses," he wanted to assert for the record that he did not engage in the charged conduct and believed his discipline was excessive. Nowhere in his statement did he reference the statute of limitations, cite section 3304, subdivision (d), or suggest that CDCR's notice of dismissal was time-barred.

The SPB held a four-day evidentiary hearing in November 2014. The focus of the hearing was whether Chandler had committed the charged misconduct. Testimony from

Reyes and the sober living facility owner supported a finding that Chandler heard Martinez's tirade against Reyes, because the owner—who was farther away from Martinez than Chandler was—not only could clearly hear the rant but was also able to pick it up on his recording device. Chandler admitted he knew he was required to report employee misconduct, yet he did not report Martinez's tirade to Gramajo and repeatedly claimed during the investigation that he did not hear it. Chandler presented evidence and argument to support his position that the allegations of misconduct were unfounded and the discipline was excessive. At no point, however, did he present evidence or call a witness to testify about any issues relating to a statute of limitations defense, such as when CDCR discovered his role in the incident or when it notified him of his dismissal. In addition, Chandler's counsel never mentioned the statute of limitations during opening or closing statements. The single time the issue of statute of limitations came up during the hearing was when CDCR's counsel was cross-examining Chandler. The following exchange occurred:

> Q. Now, you testified you overheard a conversation between Mr. Fowler and Mr. Gil regarding . . . the [CDCR's] . . . attempts to serve you with some document; is that correct?
>
> A. Yes ma'am.
>
> Q. And during that conversation, you were informed that [CDCR] was actually attempting to serve you with a document notifying you that you were being terminated; is that correct?
>
> A. No, ma'am, they, the gist of the conversation was, what's going on with Chandler? Mr. Fowler said, oh, we're firing Chandler. And that was the gist of it.

> They—the issue of them, of CDC[R] sending it to the wrong address and them having to re-serve me and all that kind of stuff, after the fact—after the—after the time period, actually, was an issue that I raised in my court hearing. That you guys weren't timely, that—that you guys blew the statute of limitations. *But that was before*.

(Italics added.)

At the conclusion of the hearing, the administrative law judge upheld the dismissal, finding the evidence supported the charges of inexcusable neglect of duty, dishonesty, and willful disobedience, which constitute grounds for discipline under section 19572, subdivisions (d), (f), (o), and (t). Specifically, the judge found that Chandler had heard Martinez's tirade against Reyes and that, despite being aware of his duty to report misconduct, failed to report the incident and subsequently lied about not being able to hear the tirade during the investigation. On February 5, 2015, the SPB adopted the judge's proposed decision as its final decision and sustained Chandler's dismissal. Neither the judge's decision nor the SPB's final decision makes reference to a statute of limitations issue.

E. *Chandler's Writ*

In June 2015, Chandler filed a second petition for writ of mandate, in pro. per., challenging the SPB's second decision upholding his dismissal. In addition to various other arguments on the merits, he argued CDCR's dismissal was invalid because they had notified him of their choice of discipline over a year after discovering the conduct supporting the discipline, thereby violating the statute of limitations in section 3304,

subdivision (d). Chandler argued CDCR discovered the alleged misconduct no later than July 26, 2010, but did not notify him of the proposed discipline until August 1, 2011.

In May 2016, CDCR lodged the complete administrative record of the 2014 hearing with the trial court.

In April 2017, Chandler filed an amended petition for writ of mandate. As relevant to this appeal, he changed his allegations about the relevant dates for his statute of limitations argument. He claimed that "[a]ll of the acts giving rise to the disciplinary action were discovered by [CDCR] no later than July 28, 2010 . . . . However, [I] was given no proper notice of the proposed disciplinary action until August 9, 2011." In its answer to the amended petition, CDCR denied the allegation that it violated the one-year statute of limitations.

In April 2017, Chandler lodged over 1,000 pages of documents with the trial court. CDCR filed various objections to these documents, including that they were not part of the administrative record and were therefore not before the SPB when it made its decision. CDCR also filed an opposition to Chandler's amended petition.

In May 2018, Chandler filed his opening brief, in which he again argued CDCR violated the statute of limitations. Citing the testimony quoted above from his cross-examination, he argued he raised the statute of limitations defense during the administrative hearing. CDCR filed another opposition to Chandler's petition maintaining that Chandler had forfeited the statute of limitations defense. CDCR argued Chandler's reference to the statute of limitations during his testimony was not an invocation of the

defense but instead a passing reference to his having raised the defense in his first administrative hearing in 2012.

The trial court held a hearing on Chandler's writ petition. After hearing argument on the statute of limitations issue, the court ordered supplemental briefing on the "very narrow issue" of whether the statute of limitations defense must be raised in writing or whether it may also be invoked orally during the hearing. In his supplemental briefing, Chandler reiterated his argument that his reference to the statute of limitations during his cross-examination was sufficient to invoke or plead the defense. CDCR argued that a statute of limitations defense is a personal privilege that is waived unless properly invoked and that Chandler had not done so. It pointed out that Chandler had numerous opportunities to invoke the defense (e.g., in his written statement to the SPB or during opening statements), and it argued that his reference to the statute of limitations during his testimony was insufficient to put it on notice that he was invoking the defense, thereby preventing it from presenting evidence to refute the defense and preventing SPB from making a factual finding on the issue.

On June 25, 2018, the trial court issued a written ruling on Chandler's writ petition. The court sustained CDCR's objections to the documents Chandler had lodged and concluded CDCR had lodged the official administrative record. The court proceeded to grant the petition on the sole ground that CDCR violated the one-year statute of limitations in section 3304, subdivision (d). The court stated, "Chandler argues that all of his alleged misconduct was discovered by CDCR no later than July 26, 2010, but he was

not given notice of the proposed discipline until August 1, 2011 or later." The court agreed with Chandler that his reference to the statute of limitations during his testimony invoked the defense. The court reasoned that because "CDCR makes no argument that the S.O.L. was not violated, only that [Chandler] should have plead the defense differently," it would therefore grant the petition "*on grounds that there has been abuse of discretion based on the statute of limitations being violated*." The court explicitly denied the writ "[*a*]*s to any other grounds*."

CDCR and SPB filed this timely appeal.

II

ANALYSIS

CDCR and SPB argue the court erred by reaching the merits of a forfeited affirmative defense and for concluding the defense was meritorious on an insufficient record. We agree.

In reviewing an administrative adjudicatory decision under Code of Civil Procedure section 1094.5, the court's inquiry is limited to the question of "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*) In reviewing an SPB decision on a petition for writ of mandate, we stand "in the same shoes as the trial court."

(*Department of Corrections & Rehabilitation v. State Personnel Bd. (Iqbal)* (2016) 247 Cal.App.4th 700, 707.) We review the SPB's factual findings for substantial evidence and questions of law de novo. (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 742.) Because SPB did not make any factual findings as to whether CDCR complied with the statute of limitations and the relevant facts are not in dispute, we undertake an independent review.

A. *Chandler Forfeited the Statute of Limitations Defense*

At issue here is section 3304, subdivision (d), which "creates a statute of limitations for punitive actions" against peace officers. (*Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 381 (*Moore*).) The provision states that "no punitive action . . . shall be undertaken for any . . . allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of . . . misconduct." (§ 3304, subd. (d).) It also requires the public agency to "notify the public safety officer of its proposed discipline within that one-year period." (*Ibid.*) This one-year limitations period "begins to run when a person authorized to initiate an investigation discovers, or through the use of reasonable diligence should have discovered, the allegation of misconduct." (*Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 106 (*Pedro*).)

"It is well established that the statute of limitations is a personal privilege which is waived unless asserted at the proper time and in the proper manner, whether it be a general statute of limitations or one relating to a special proceeding. [Citations.] This

general rule applies to proceedings before an administrative tribunal." (*Bohn v. Watson* (1954) 130 Cal.App.2d 24, 36 (*Bohn*); *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 53 ["a defense based on a statute of limitations or other statutory time limit may, and indeed must, be raised in administrative proceedings, because the failure to raise such a defense at the administrative hearing waives the issue on review of the administrative proceedings"].) "California law has long provided that a statute of limitations defense must be raised at an administrative hearing before relief may be sought on that ground under Code of Civil Procedure section 1094.5. (*Moore*, *supra*, 156 Cal.App.4th at p. 382 [concluding "[t]he trial court was correct in ruling that the [§ 3304, subd. (d)] statute of limitations defense was forfeited by failure to raise it before the board of rights"]; see also *Alameida*, at p. 53 ["the failure to raise . . . a [statute of limitations] defense at the administrative hearing waives the issue on review of the administrative proceedings"].)

Bohn and *Moore* are instructive. In *Bohn*, the plaintiff petitioned the superior court for a writ of mandate to compel the real estate commissioner to cancel his order revoking her license and to reinstate her as a broker. (*Bohn*, *supra*, 130 Cal.App.2d at p. 28.) In the administrative proceeding, Bohn did not invoke the statute of limitations at any point. She did not plead it in her answer or present evidence or argument on it during her two-day evidentiary hearing. The first time she argued the charges against her were time-barred was during the writ of mandate proceedings before the trial court. The trial court denied her writ petition and the appellate court affirmed. The appellate court held that

Bohn had forfeited the statute of limitations defense by failing to invoke it during the administrative proceedings. The court explained, "[h]ad Bohn desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon." (*Id.* at p. 37.) "It is fundamental that the review of administrative proceedings provided by section 1094.5 of the Code of Civil Procedure is confined to the *issues* appearing in the record of that body as made out by the parties to the proceedings, though additional *evidence*, in a proper case, may be received. [Citation.] It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court." (*Ibid.*) The court emphasized the purpose of forfeiture or administrative exhaustion. "The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play." (*Ibid.*)

In *Moore*, a police officer who was removed from his position after an administrative hearing challenged his dismissal in the superior court in a petition for writ of mandate. (*Moore, supra,* 156 Cal.App.4th at p. 376.) In addition to challenging the sufficiency of the evidence supporting his termination, Moore argued the city had violated his right to have the investigation into his conduct completed within the one-year

statute of limitations found in section 3304, subdivision (d), the same provision at issue here. (*Moore*, at pp. 376-377.) The trial court ruled that Moore had forfeited the statute of limitations defense by not raising it during the administrative hearing, and the appellate court agreed stating, "[b]ecause the administrative record does not encompass resolution of the statute of limitations issue, it simply was not properly before the trial court." (*Id.* at pp. 377, 382-383, 386.)

The *Moore* court set forth the two ways a peace officer may raise a statute of limitations defense to the validity of disciplinary actions. "[T]he statute of limitations must be raised either (1) at the administrative hearing, or (2) in a proceeding under section 3309.5, subdivision (c), which asserts a violation of one of the rights in the [Public Safety Officers Procedural Bill of Rights] Act. Moore never sought to invoke the superior court's injunctive power to enforce his rights under the Act pursuant to section 3309.5. All Moore alleged in his petition for administrative mandate under Code of Civil Procedure section 1094.5 was that the decision to discharge him 'was an abuse of discretion in that the findings of the Board of Rights are not supported by the weight of the evidence.' Having failed to invoke the superior court's remedial powers under section 3309.5, and having failed to raise his statute of limitations argument under section 3304, subdivision (d) at the [administrative hearing], the trial court properly ruled the statute of limitations issues was forfeited." (*Moore*, *supra*, 156 Cal.App.4th at pp. 384-385, citing *Alameida v. State Personnel Bd.*, *supra*, 120 Cal.App.4th 46.) The upshot of these rules is that "a public safety officer may [not] raise a statute of limitations defense for the first

time by way of petition for administrative writ of mandate, where the issue was not raised at the administrative hearing and was not the subject of a separate proceeding under section 3309.5." (*Moore*, at p. 385.)

The *Moore* court explained that the "reason for the [forfeiture] rule is clear"—it prevents gamesmanship and unfair surprise to the other party. (*Moore*, *supra*, 156 Cal.App.4th at p. 383.) The court explained that because the statute of limitations issue is "fact specific" (e.g., when did the city discover the officer's alleged misconduct, were there facts to support tolling or waiver, and when did the city inform the officer of the proposed discipline?), "the absence of *an objection*" by Moore meant that "the City and [the Chief of Police] never had an opportunity to present evidence on these issues." (*Id*. at p. 386.) In other words, at the administrative hearing, "there was no opportunity to question [Moore] on this subject or otherwise develop a factual record to refute [his] contention." (*Ibid.*)

The facts in *Moore* are essentially identical to the facts here. Like Moore, Chandler did not argue at any time during the administrative proceedings that CDCR's dismissal was invalid because it violated the one-year statute of limitations, nor did he seek injunctive relief from the trial court under section 3309.5. Instead, he waited until his writ of mandate proceedings to raise the defense. This both asked the trial court to rule on a defense that was not before the SPB and deprived CDCR of developing a factual record to refute the defense.

Chandler argues, as he did in the trial court, that his reference to the statute of limitations during his cross-examination sufficiently raised the defense for forfeiture purposes. We disagree. The reason parties to an administrative hearing are required to raise all affirmative defenses, like statute of limitations, is twofold—it allows the other side to respond to the defense and present evidence in opposition and it allows the administrative law judge to decide the issue (which the trial court then reviews in a mandate proceeding). While Chandler may have uttered the words "statute of limitations," case law is clear that a "perfunctory or 'skeleton' showing in the [administrative] hearing" will not avoid the forfeiture rule. (E.g., *Bohn*, *supra*, 130 Cal.App.2d at p. 37.) Chandler's reliance on *County of San Mateo v. Booth* (1982) 135 Cal.App.3d 388, where the appellate court found the defendant had not forfeited the statute of limitations defense because he "pleaded or presented [the defense] to the trial court *in some fashion*," is unavailing. (*Id.* at p. 399.) In that case, the defendant had explicitly pled a statute of limitations defense as an affirmative defense in his answer, but he cited the wrong statutory provision (Code Civ. Proc., § 336 instead of § 338), leading the plaintiff to claim he failed to put them on notice of the defense. (*County of San Mateo*, at pp. 399-400.) The court concluded the incorrect citation did not prevent the plaintiff from understanding he "intended to raise [a time] bar," and as such, he had sufficiently pled the defense (that is, he pled it "in some fashion"). (*Ibid.*) Here, Chandler never pled or even informally argued that CDCR had violated the statute of limitations, so the case does not help him.

More importantly though, the context in which Chandler referenced the statute of limitations during his testimony makes it clear he wasn't invoking the defense in that proceeding, but rather referring to the fact that he had invoked it in the prior proceeding. Chandler said he had argued in his prior hearing "that you guys blew the statute of limitations," and added —"but that was before." The only reasonable inference to draw from Chandler's qualifying language is that while he may have raised the defense in a previous proceeding, he was not raising it in the current proceeding. In other words, Chandler went further than simply not invoking the defense, he actually indicated he wasn't invoking it. As a result, CDCR did not endeavor to present any evidence to prove it complied with the statute of limitations, and the administrative law judge and SPB did not address the issue in their decisions. Chandler faults CDCR for failing to cross-examine him on the statute of limitations issue, arguing they had the opportunity to do so, but what he misses is that CDCR had no reason to believe he was invoking the defense. It would be fundamentally unfair to allow Chandler to raise the issue now in a mandate proceeding where the administrative record is established and the parties cannot present evidence on relevant issues, such as when the person at CDCR authorized to initiate an investigation discovered not only the Reyes/Martinez incident but also that Chandler had witnessed it and failed to report it. (*Pedro*, *supra*, 229 Cal.App.4th at p. 106.)

That Chandler raised the statute of limitations argument "from the earliest stages of his mandamus proceeding by clearly invoking the [argument] in his petition for a writ of mandate" is inconsequential. The relevant inquiry is whether he put CDCR on notice

during the administrative proceeding that he was claiming a statute of limitations defense. The fact he notified CDCR about the defense early in *the writ proceeding* does nothing to avoid application of the forfeiture rule.

B. *The Trial Court's Ruling Is Not Supported by Substantial Evidence*

We also agree with CDCR and SPB that even if Chandler had not forfeited the statute of limitations defense, the record contains insufficient evidence for the trial court to rule in his favor.

Both CDCR and Chandler represented to the SPB in their prehearing/settlement conference statements that CDCR served its original notice of proposed discipline on July 20, 2011, and Chandler represented he "would be amenable and offer[ed] to stipulate" to that fact. Chandler lodged documents with the court that he claims support a different finding, but the court ruled the documents were inadmissible and refused to consider them because they were not before the SPB.[2]

Chandler argues CDCR should be estopped from arguing that the first notice was served on July 20, 2011 because it has "repeatedly represented" that the "effective" notice was served on August 10, 2011. But Chandler misunderstands what CDCR means when it refers to the August 10 notice as the "effective" notice—it means that notice contained the effective dismissal date of August 26, 2011, not that the August 10 notice is the effective notice for statute of limitations purposes. And in any event, even if we

[2] The trial court was correct to exclude Chandler's extra-record documents, and because they were not part of the administrative record, we likewise deny Chandler's request that we take judicial notice of them on appeal.

assume in Chandler's favor that the August 10 notice is the operative notice for statute of limitations purposes, the record still lacks sufficient evidence regarding the second piece of the timeliness puzzle—when the limitations period began to run. That issue is fact specific and requires evidence showing when a CDCR employee "authorized to initiate an investigation discovers, or through the use of reasonable diligence should have discovered" that Chandler had failed to report Martinez's misconduct. (*Pedro, supra*, 229 Cal.App.4th at p. 106.) Such evidence is missing from the administrative record, and the reason it is missing is because Chandler did not raise the defense during his hearing.

III

DISPOSITION

We reverse the order granting Chandler's writ of mandate and direct the trial court to deny the petition. In the interests of justice, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.